

Testimony of

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before the

United States Sentencing Commission

on

Sentencing Guidelines for Crack and Powder Cocaine

February 21, 2002

Abstract

In my testimony, I focus on the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Because crack markets are operated predominantly by blacks, this difference conveys a strong sense of racial discrimination and is a profound challenge to the legitimacy of the criminal justice system. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs, I discuss why those differences may have occurred as a result of the nature of the markets much more than as a result of any pharmacological differences between the drugs. The evolution of the crack markets has resulted in a significantly lower level of violence today than that which characterized their early years. Also, it seems much more rational to use sentencing enhancements to punish those individuals who use violence regardless of the drug they are dealing with than to base the sentencing difference on the chemical itself. Similarly, enhancements should be considered to account for an offender's role in the distribution hierarchy. If that were done, then Federal crack offenders would be treated even more leniently than powder-cocaine offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder. If the Commission feels it necessary to create a difference even in the presence of an appropriate array of enhancements, then it should negotiate for the smallest difference that would be accepted.

So many of these problems derive from the constraints put on sentencing policies by the passions that are reflected in mandatory-minimum sentences. I would hope that the Commission could capitalize on the growing national enlightenment on drug policy (e.g., Proposition 36 in California mandating treatment instead of incarceration) to urge the Congress to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to enthusiastic cheers throughout the nation's judiciary.

Testimony of Alfred Blumstein

Judge Murphy and Members of the Commission:

Thank you for inviting me. I am honored by the opportunity to appear before you today as you consider the various issues involved in the important question of sentencing guidelines for drugs.

As background to my own involvement in this issue, I have engaged in a variety of criminological research since my involvement as Director of Science and Technology for the President's Commission on Law Enforcement and Administration of Justice in 1966. I have been involved in practical policy matters as a member of the Pennsylvania Sentencing Commission for ten years between 1987 and 1997, and I served as the chairman for over eleven years of the Pennsylvania Commission on Crime and Delinquency, the state's criminal justice planning agency, which manages Federal criminal justice funds in Pennsylvania. Attached to my testimony is a short biographical statement for your information.

Some Background on Sentencing and the Drug Problem

I began to think hard about sentencing policy when I chaired a National Academy of Sciences Panel on Sentencing Research, which recommended the development of sentencing guidelines. I thought particularly hard about sentencing for drug offenses in my Presidential Address to the American Society of Criminology in 1992 when I came to recognize that prisons were filling up with drug offenders in the mid-1980s (see Figure 1 for a clear indication of this growth), but that growth was not likely to have much effect on drug markets because the resilient drug markets were quite able to recruit new sellers to replace those sent to prison and even those deterred from drug selling because of the draconian sentences being imposed. As a result, drug transactions would continue to respond to the articulated demand, and the number averted through incarceration would be negligibly small as long as the demand persists.

It was only subsequently that I came to appreciate that the massive incarceration was not only ineffective, but was seriously counter-productive. The young people recruited as replacements in the crack markets were primarily African-American youth drawn from inner-city areas who had little opportunity in the legitimate economy at the time. This recruitment is indicated in Figure 2, which displays the ratio of arrests of non-whites compared to those of whites; here, we see that the ratio for adults began to climb in the early 1980s, whereas that for juveniles didn't begin to climb until 1985 (as the prisons were filling with the older sellers) and reached a peak of four times that of whites from 1989 until 1992, and then began a sharp decline as the demand for crack by new users dried up in the early 1990s. Since these were street markets, these youths had to carry handguns to protect themselves against street robbers, and these young folks were far more volatile with their guns than the older people they replaced. Not only were these replacements a violence problem, but because of the tight networking among young people (remember the sneakers epidemics of the 1970s), we saw a major diffusion of handguns from these recruits to their friends, and on out into the larger community. That was the major factor contributing to the rise of violence that began in about 1985, reached a peak in 1993, and has been declining since. The entire rise in homicide from 1985 to 1993 was attributable to young people with handguns.

The Infamous Crack-Powder Disparity

With this background, I would like to address what I consider the most blatant embarrassment of the current guidelines and sentencing statutes - the 100:1 disparity between the 5 grams of crack and the 500 grams of powder warranting a 5-year mandatory-minimum sentence. Because crack is dealt primarily by blacks (85% of Federal crack offenders are black), whereas powder cocaine is dealt with primarily by whites (18%) and Hispanics (48%) (data from DB, Figure 27). This disparity associated with race is so extreme and is far more egregious than the relatively minor differences in stops claimed to be racial profiling (differences in the order of factors of two to five, nowhere near 100). The vigorous challenges against racial profiling have been widely responded to in most quarters.

The 100:1 disparity is widely seen as blatant proof of racial discrimination by the criminal justice system, and thereby contributes in important ways to serious challenge to the legitimacy of that system. It is crying for careful reconsideration, at a minimum because of the powerful symbolic import of that difference. That reconsideration should focus on issues of culpability of people arrested for drug offenses, their level in the distribution hierarchy (particularly the degree to which they are the “king-pins” against whom the rhetoric surrounding severe sentences are almost always focused), and especially the societal harm associated with their involvement

Societal Harm and Violence

The first and probably most important basis for reconsideration relates to the issue of societal harm, specifically the violence associated with the marketing of crack, especially at the time the Congress introduced the original 100:1 disparity. But, as with all illegal drugs, that difference in violence is far less associated with the pharmacological nature of crack and its behavioral effects than with the nature of its market. We have to understand that market, both in its initial years and how it has changed in recent years.

Crack came on the scene in the early 1980s as an important technological innovation that made the “pleasures” of cocaine available to a stratum of society that could afford a hit-at-a-time purchase of crack but did not have the capital to buy powder in its minimum available quantities. That innovation started initially in the coasts, particularly New York City and Los Angeles, and worked its way into the center of the country. As with any innovation that significantly expands the size of the market, there was vigorous competition for a share of that growing market. However, as with all illegal markets that are denied access

to civil dispute-resolution mechanisms, that competition often shows itself in the use of violence against competitors.

Also, the means and locus of distribution contributed to the growth of violence. First, the aggressive marketing of crack, particularly to the new customers, typically took place in street markets, typically in the poorest neighborhoods of the city, neighborhoods where violence is much more common than in the more affluent neighborhoods where powder would be more likely to be sold. Also, the participants in street drug markets need their own protection against street robbers, who might see these markets as prime targets because their victims would not be likely to call for help from the police. Thus, those in the street markets were likely to carry a handgun for self-protection, and the presence of these handguns inevitably escalated the level of violence in any disputes.

Finally, the phenomenon discussed in the Background section became a major factor in the late 1980s and early 1990s: recruitment of young people as replacements for the crack dealers sent to prison, arming of these volatile individuals, and diffusion of guns to their friends, and resort to the traditional mode of teen-age dispute resolution - fighting - but with much more lethal consequences because of the nature of the weapons that had suddenly appeared.

Recent Developments in Violence

Thus, for all these reasons, we saw considerably more violence associated with crack during its early years, and that difference may well have provided the rationale behind the disparity in the mandatory minimums. But that situation has changed considerably. The nation's violence rates are now well down, lower than they have been for over 35 years. The rates of violence by young people are down to or below the level they started at in 1985. The crack markets have matured with the absence of new users, and so there is no longer a need for the young participants (see the decline after 1993 in Figure 2), it is much easier to sell to established customers, sellers' market shares have largely stabilized, and police have been effective in getting the guns out of the hands of the kids

Taking Account of Differences in Violence in Different Drug Markets

Thus, while there may still be somewhat more violence associated with crack markets, it seems to make little sense to associate the penalty with the chemical composition of the drug. It seems so much more appropriate to associate the penalty with the violent behavior itself. Thus, the Commission's proposal to

provide sentencing enhancements for gun carrying - and especially for gun use - seems to carry out that concern with a principle that is so much more appropriate than associating it with the drug involved.

Role of Offenders in the Distribution Network

The principle of culpability would seem to apply much more strongly to those high in the distribution hierarchy and whose distribution scope is national as opposed to local. The Drug Briefing provides some striking data reflecting on this issue. Fully two-thirds of the Federal crack offenders are street-level dealers compared to 29% of the powder cocaine offenders (Figure 12). Also, the street-level dealers for both crack and powder are the functionaries with by far the lowest median quantity of drugs in their possession (Figure 18). Furthermore, the crack offenses are predominantly confined within a city or neighborhood (75% are neighborhood or local compared to 37% for powder cocaine). Thus, based on this consideration alone, the sanction for powder should be higher than for crack. But, as with violence, any such distinctions should be based on the role and behavior of the individual offender through sentencing enhancements rather than through the chemistry of the drug.

Mandatory Minimums

The fundamental principle underlying the creation of sentencing commissions is that they provide a means for giving careful deliberation to the level of sentence that is most appropriate for a particular class of offense and offender broadly defined, and that they provide enough slack to the individual judge dealing with a particular case to address those relevant factors not incorporated in the guidelines. Indeed, many state legislatures created their sentencing commissions in the 1980s as a blocking action against the then faddish mandatory minimums. In their calmer moments, they realized the inappropriateness of the political passions that so often drive sentencing decisions by a legislative body. This can happen after a particularly heinous crime has captured the headlines. It can also happen when the public becomes sufficiently concerned about some crime problem that it demands the political system “do something”; if there is nothing obvious to do, then the legislature can always resort to passing a mandatory-minimum sentencing law. Regardless of whether it does any good in addressing the crime problem, it has indeed seemed to work in at least temporarily satiating the public’s demands. This has certainly been the case with the drug mandatories. When the early two-year mandatories didn’t work, then they were cranked up to five years, and then to ten years, never with any clear or careful assessment of what good - or harm in terms of the replacements recruited - they did.

I think it is fair to say that the political passions that fueled the passage of many mandatories - especially in the drug area - have cooled considerably. This is reflected in the passage in California of Proposition 36 calling for community treatment in preference to incarceration for drug offenders. Similar moves are under way in a number of other states. The pressure to make such changes results from a combination of fiscal problems faced by the states and a growing recognition of the ineffectiveness - often pure futility - of the often-draconian mandatory-minimum sentencing laws. I have for a long time advocated sunseting mandatory-minimum sentencing laws because I have been skeptical that legislatures would be willing to risk being labeled "soft on crime" by repealing any of them. At least, with sunseting, the law would have to be reconsidered after some period of time, and the ineffective ones left to disappear quietly in the absence of a strong reason to extend them.

I believe the time may well have come for the Commission to urge to Congress to at least sunset its mandatory drug laws to enable the Commission to emerge with a careful and rational structure in a deliberative way.

Summary

In these few pages, I have tried to highlight the concern about the most distressing and embarrassing 100:1 disparity in the sentencing guidelines for crack compared to powder cocaine. Since the rationale for the original disparity may have been attributed to differences in the violence associated with the respective drugs, I have discussed why those differences may have occurred as a result of the nature of the markets much more than as a result of any pharmacological differences between the drugs. The evolution of the crack markets has significantly lowered the level of violence that characterized their early years. Also, it seems much more rational to use sentencing enhancements to punish those who use violence regardless of the drug they are dealing with than to base the sentencing difference on the chemical itself. Similarly, enhancements should be considered to account for an offender's role in the distribution hierarchy. If that were done, it becomes apparent that Federal powder cocaine offenders should fare even worse than crack offenders. Thus, with appropriate use of enhancements for those aspects of drug markets that are of particular concern, I see no clear reason why there should be any difference in sentencing guidelines between crack and powder. If the Commission feels it necessary to create a difference even when an appropriate set of enhancements is in place, then it should negotiate for the smallest difference that would be accepted.

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reflected in mandatory-minimum sentences. I would hope that the Commission could capitalize on the growing national enlightenment on drug policy to urge the Congress to at least sunset its drug-related mandatory-minimum sentencing laws if it is unwilling to repeal them outright. I am confident that such an action would lead to vigorous cheering throughout the nation's judiciary.